HOME BUILDER BUILDING HOME TO RENT MUST ALSO REGISTER WITH NHBRC

National Home Builders' Registration Council & Another v Xantha Properties 18 (Pty) Ltd (780/2018, 784/2018) [2019] ZASCA 96 (21 June 2019)

According to the Housing Consumers Protection Measures Act 95 of 1998, all new homes must be enrolled with the NHBRC 15 days prior to construction and an enrollment fee must be paid. Home enrolment insures consumers against poor building practices and permits the NHBRC to conduct building inspections at key stages of construction. The question that was disputed in this matter was whether this requirement applied where the builder intended to lease the buildings and not sell them, effectively then being required to insure with the NHBRC against itself.

The Judgment can be viewed here.

FACTS

Xantha Properties 18 (Pty) Ltd ("Xantha") embarked upon the construction of a property development in Cape Town consisting of a number of shops and 223 residential apartments.

It averred that it had no intention of selling these apartments or developing them in terms of a sectional title scheme but rather intended to rent these to tenants. In these circumstances, and although it was registered as a 'home builder' as defined in the Housing Consumers Protection Measures Act 95 of 1998 ("the Act"), it disputed that it was obliged to enroll the project with the National Home Builders Registration Council ("the Council") or to pay the prescribed enrolment fee as prescribed by section 14(1) of the Act.

The relevant parts of section 14 reads:

> *"A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless-*
>
> *a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;*
>
> *b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and*
>
> *c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder."*

The further important definitions in section 1 of the Act for purposes of this judgment is that of "home builder" and "business of a home builder". A home builder is defined, inter alia, as meaning "a person who carries on the business of a home builder" whilst such business is defined as meaning:

> *"(a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;*
>
> *(b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a*

home;

(c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal; or

(d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition."

The words 'leasing, renting out' contained in sub-para (b) of this definition were not included in the Act as originally passed but were inserted with effect from 9 April 2008 by way of the Housing Consumers Protection Measures Amendment Act 17 of 2007.

With the Council, Xantha argued that the Act was intended to provide a form of housing insurance in favour of housing consumers against errant home builders. It contended that where, as in the present case, there was no third party, and the home builder was, itself, the effective end user of the apartments which it intended to rent out, it was absurd to expect it to insure against itself. It argued further that despite the definition of 'business of a home builder' containing specific reference to homes constructed for the purpose of being let, section 14(1) has no application in such a case because the definition in section 1 of the Act of 'housing consumer' refers to 'a person who is in the process of acquiring or has acquired a home and includes such person's successor in title'. In the light of this, it was argued, the word 'acquire' used in this definition is generally understood as buying or obtaining ownership of something which, in the context of the Act, would mean obtaining ownership of a home. Therefore, a person who rents a property without becoming its owner cannot be said to have 'acquired' the property and, by definition, can thus not be a 'housing consumer'. Accordingly, so the argument went, as section 14(1) is in chapter 3 of the Act which is headed 'PROTECTION OF HOUSING CONSUMERS', and as housing consumers are limited to persons who either purchase homes or have homes built for them, the Act and its regulatory scheme were not intended to apply to properties being constructed for the purpose of rental; and section 14(1) thus did not apply in such a case.

The Council did not agree and advised Xantha to enroll the apartments. This it ultimately did, and paid the assessed enrolment fee (a sum in excess of R1.5 million) but did so under protest. It then applied to the High Court for an order declaring that section 14(1) did not require a home builder to enroll houses being constructed solely for the purpose of being let.

Xantha was successful and the Council appealed to the Supreme Court of Appeal.

HELD

- The underlying purpose of the Act, on the face of it, trumps Xantha's argument. The Act was designed to afford adequate housing for residents by ensuring that their homes are constructed by competent builders to approved standards. These objectives were sought to be achieved, first, by section 10 (to ensure that homes are constructed by persons having the necessary competence) and, secondly, by section 14 (to enroll such homes and ensure that they are built to a prescribed level of structural and technical quality). These provisions are supplemented by section 19 of the Act which, inter alia, allows for the Council to appoint inspectors who may enter and inspect the premises constituting the site of the construction at any reasonable time and who may also "require the production of the drawings and specifications of a home or any part of a home, including plans approved by the local authority and plans and specifications prescribed in the Rules or the Home Building Manual, for inspection from the home builder and may require information from any person concerning any matter related to a home or any part of a home;" ask to "be accompanied by any person employed or appointed by the Council who has special or expert knowledge of any matter in relation to a home or part of a home; and "alone or in conjunction with any other person possessing special or expert knowledge, make any examination, test or enquiry that may be necessary to ensure compliance with the Home Building Manual."

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Helderberg T: 021 850 6400
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Illovo T: 011 219 6200
Fourways T: 010 001 2632
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- Without homes being enrolled under section 14, inspectors would be unable to identify them or to fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled.

- In the light of this, and when one remembers that the fundamental underlying premise of the Act is to guard against builders constructing sub-standard homes and that the definition of a home builder's business was amended to specifically include building homes for purposes of being let or rented out, there can be no reason why the legislature would have intended to treat homes built for leasing purposes any differently from those constructed for sale. There is certainly nothing in the structure of the Act which indicates that to be the case.

- On the contrary, there is every reason to think that the legislature would have wished homes built for sale to be treated the same way as homes built for lease. Circumstances often change, and it takes little imagination to envisage how a home being constructed for rental purposes might end up being sold rather than let. And requiring both categories of home to be enrolled would not only avoid a sub-standard home being sold in those circumstances, but would also serve to mitigate against the abuse of unscrupulous developers building inferior homes allegedly for leasing purposes, then professing to change their minds and selling them.

CONCLUSION

The appeal succeeded.